

Filed 12/13/04

CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

CHRISTOPHER BRILEY et al.,

Petitioners,

v.

THE APPELLATE DIVISION OF THE
SUPERIOR COURT OF LOS ANGELES
COUNTY,

Respondent;

HERMOSA BEACH POLICE DEPARTMENT
et al.,

Real Parties in Interest.

No. B175411

(Super. Ct. Nos. 3SB05129
and BS089572)

ORIGINAL proceeding, petition for writ of mandate. Jessie L. Rodriguez, Judge.
Petition granted.

Thomas E. Beck for Petitioners.

No appearance for Respondent.

Jenkins & Hogin, Michael Jenkins and Gregg Kovacevich for Real Parties in
Interest.

Goldwasser & Glave and Corey W. Glave as Amicus Curiae on behalf of
Respondent and Real Parties in Interest.

Petition for writ of mandate by Christopher Briley and Justin Thomas to compel respondent tribunal, appellate division of the Los Angeles County Superior Court, to vacate its order dated May 3, 2004, denying petitioners' petition for writ of mandate and to enter a new and different order reinstating the trial court's order of March 1, 2004, granting pretrial disclosure of relevant evidence in the custody of the Hermosa Beach Police Department ("Department"). Petitioners seek, and are entitled to, percipient witness statements gathered by the Department relating to the arrest of petitioners on July 4, 2003. Accordingly, we grant the petition for writ of mandate.

FACTUAL AND PROCEDURAL BACKGROUND

Beck is counsel of record for petitioners. This factual summary relies on his declaration filed with the petition on May 21, 2004. As the case has not been brought to trial, this summary serves solely as background for the determination of the writ.

The Incident Leading to the Arrest

On July 4, 2003, Briley (age 22), Thomas (age 23), Randy Wareberg (age 23) and Sam Harang (age 23) were standing at the foot of Pier Avenue at approximately 4:00 p.m. The area was densely crowded. Wareberg got into a non-violent confrontation with another man. Hermosa Beach Police Department Officer Jonathan Sibbald intervened, grabbing Wareberg by the throat with great force, shoving him backward and down onto the pavement, and handcuffing him. Petitioners and many others in the crowd witnessed the assault.

Petitioners and the crowd began yelling at Sibbald demanding to know why he had attacked Wareberg and pleading for him to let Wareberg alone. A huge crowd gathered and a circle was formed with petitioners, Wareberg and Sibbald in the middle. Sergeant Nancy Cook, reacting to the verbal protestations, approached Thomas and grabbed him by his outstretched finger and twisted it with enough force to cause the finger to fracture.

Cook turned away from Thomas and entered the center of the circle. Briley was grabbed out of the crowd by Officers Landon Phillips and Sibbald. Both officers grabbed and choked Briley, took him to the pavement and handcuffed him. Noticing what was being done to Briley, Thomas became involved; Cook approached Thomas a second time and slapped him in the neck and face area. As Cook tried to hit him in the face again, Thomas momentarily took Cook by her arm and prevented her from striking him. Sibbald joined Cook and Phillips against Thomas and all three officers forced Thomas to the pavement, choking him into unconsciousness. Briley stood up and rejoined the crowd, at which point Sibbald struck Briley in the throat bringing him back to the pavement. While Briley was on the ground, Sibbald put his knee into Briley's chest and pressed him against the hot pavement. Sibbald then returned to join Cook and Phillips who were still choking Thomas. A radio car pulled up and petitioners were taken to the Hermosa Beach jail and charged with violation of Penal Code section 148 (resisting public or peace officers).

Subsequent Investigation

A witness came forward in response to a newspaper advertisement by petitioners and revealed the entire incident had been videotaped. When the police reports were disclosed at the time of petitioners' arraignments and compared with the videotape petitioners asserted that it was apparent that the officers had conspired to cover up their brutality and groundless arrests. Based on the police reports, criminal charges had been filed under Penal Code section 148. After comparing the police reports with the videotape, the Chief of Police of Hermosa Beach and the District Attorney's office amended the complaint against Briley by adding counts for battery and fighting in public.

On the day of the incident, Briley, Thomas and Wareberg attempted to register a complaint with the on-duty watch commander, but were told that a complaint could not be filed. Later, their counsel attempted to file a criminal complaint against the officers with Hermosa Beach Police Chief Michael Lavin and the special prosecutions section of the Los Angeles County District Attorney's office, bringing to their attention the previously undisclosed videotape of the incident. Return correspondence advised Beck

that Lavin had directed Hermosa Beach Police Department Lieutenant Thomas Bohlin to investigate the charges administratively. Bohlin went to Beck's office to interview Thomas and Briley on November 20, 2003; at that time Bohlin informed Beck that he had taken statements from the officers as part of his investigation.

The *Pitchess* Motion

On January 15, 2004, Beck filed a motion under Evidence Code sections 1043 and 1045 for the disclosure of verbatim peace officer and civilian witness statements gathered during the internal affairs investigation, pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. Petitioners maintained that the verbatim statements of the witnesses were essential to them as exculpatory evidence and for purposes of impeachment and/or cross-examination at the time of trial. Petitioners contended that these statements were firsthand statements of witnesses to the events, were likely to address the videotape of the incident, and referred to charges filed that were not based on either the arrest report or the videotape. Petitioners further alleged that their prior "*Pitchess*" motion, in which they sought and received names and addresses of third party complainants and character witnesses, did not disclose the statements of these actual witnesses to the events on July 4 who are likely to testify at trial against petitioners.

The supplemental motion sought, along with other material not now in dispute, discovery of "[v]erbatim recorded or written statements by any and all civilian witnesses and law enforcement personnel in connection with the Hermosa Beach Police Department investigation into defendants' misconduct complaint pertaining to the incident which underlies the instant prosecution."

The Department filed opposition to petitioners' motion on February 10, 2004, asserting that the declaration submitted in support of discovery failed to establish good cause and materiality for the production of the requested documents and that the requested categories of documents were overbroad.

Petitioners filed a consolidated reply to the opposition and the matter was heard on March 1, 2004, before the Honorable Jesse L. Rodriguez, judge of the superior court. Judge Rodriguez determined the moving parties had shown good cause, consistent with

Evidence Code section 1043, and directed the Department to produce the officers' statements in transcribed form for an in camera inspection by March 14. Counsel for the parties were ordered to return to court on March 23 for a compliance hearing.

On March 18, the court clerk advised the parties that they should be prepared to reargue the motion. On the 23rd of March, the court heard argument and reversed its decision. The court based its new ruling on a concern that granting this request would encourage defendants in other cases to file complaints against the officers involved in their arrest in order to obtain discovery of personnel files. The court, therefore, reversed its finding of good cause and declined to review the investigation interview transcripts in camera.

Writ Proceedings

Petitioners filed a petition for writ of mandate in the appellate division of the superior court on April 20, 2004. After consideration of the April 28, 2004, preliminary opposition of the Department, the appellate division issued a minute order denying petitioners' writ without explanation.

On May 27, 2004, this court considered the petition for writ of mandate and request for stay filed with the Court of Appeal on May 21, 2004. This court requested real party in interest City of Hermosa Beach to serve and file opposition on or before June 7, 2004. On May 28, 2004, this court stayed the action in the superior court.

Subsequently, on June 3, 2004, this court notified the parties that it might elect to issue a peremptory writ in the first instance and invited the City to file supplemental opposition and the People to file points and authorities addressing the issues raised in the appeal.

On June 17, 2004, this court issued its order to show cause why the superior court should not be compelled to vacate its order of May 3, 2004 denying the petition for writ of mandate filed by petitioners Briley and Thomas and to issue a new and different order granting the petition.

DISCUSSION

The information sought by the defense on this case consists of statements by percipient witnesses to the events that form the basis for the pending criminal charges. The criminal discovery statutes ordinarily require the disclosure of “[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . .” so long as this information is in the possession of the prosecutor or known to be in the possession of the investigating agencies. (Pen. Code, §§ 1054.1; 1054.1 subd. (f).) Statements of percipient witnesses and witnesses anticipated to be called at trial are customarily discoverable without request. (*Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 978.)

In addition, the prosecution has an independent obligation to disclose to the defense material evidence that is “favorable to the accused.” (*Brady v. Maryland* (1963) 373 U.S. 83,86-87). This obligation, one of constitutional dimensions, obligates the prosecution to learn of “favorable evidence ‘known to the others acting on the government’s behalf in [a] case, including the police.’” (*Kyles v. Whitley* (1995) 514 U.S. 419, 437-438.) This duty to disclose encompasses not only exculpatory evidence, but also impeachment evidence: “It is undisputed that materials that ‘may be used to impeach a witness’ fall within the class of information subject to *Brady* because impeachment information affects the fairness of trial.” (*City of Los Angeles v. Superior Court (Brandon)* (2002) 29 Cal.4th 1, 16.)

The required showing for the *Brady* obligation is that the evidence be “material to the fairness of trial.”

The prosecution did not disclose the material at issue here under either *Brady* or Penal Code section 1054. We presume that they relied on relevant provisions of the Penal Code to do so. The statements exist because petitioners filed a citizen’s complaint against the involved officers, which in turn triggered an investigation pursuant to Penal Code section 832.5. Records created as a result of such investigations become

confidential records, which “shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to [s]ections 1043 and 1046 of the Evidence Code.” (Pen. Code, § 832.7, subd. (a).) Such a motion must be in writing, with notice to the agency, and show good cause and materiality to the subject matter. (Evid. Code, § 1043, subd. (b)(3).) In compliance with this statutory scheme, petitioners filed their *Pitchess* motion.

Pitchess, like this case, involved a defendant who claimed self-defense when he was accused of battery against the arresting officers. In that case, unlike this one, what he sought for trial was information concerning prior complaints of unauthorized use of force against other persons by the officers. The purpose of his motion was to obtain this information, which was otherwise protected from disclosure because it was part of the officer’s personnel file, because it was nonetheless relevant and material to his defense. “*Pitchess* . . . and its statutory progeny are based on the premise that evidence contained in a law enforcement officer’s personnel file may be relevant to an accused’s criminal defense and that to withhold such relevant evidence from the defendant would violate the accused’s due process right to a fair trial.” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227.) To balance the privacy rights of the officers and the departments’ need to conduct a full, fair and timely investigation of complaints against the rights of the accused, the *Pitchess* court established a requirement of a showing of good cause, coupled with an in camera review by the court to prevent disclosure of information not relevant to the defense.

The standard for ordering disclosure under *Pitchess* is that information be “material to the subject matter involved in the pending litigation.” This test is recognized to be a lower standard than that required for *Brady* material. (*Brandon, supra*, 29 Cal.4th at p. 10.) The “threshold for discovery embodied in section 1043 has been characterized by our Supreme Court as ‘relatively low.’ [Citation.] All the law requires to show good cause to permit such discovery is the ‘materiality’ of the information to the subject matter of the pending litigation and a reasonable belief that the governmental agency has the

‘type’ of information requested.” (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392.)¹

The guidelines make clear that the limits on disclosure are narrow. (Evid. Code, § 1045, subd. (b).) “The relatively relaxed standards for a showing of good cause under section 1043, subdivision (b) -- ‘materiality’ to the subject matter of the pending litigation and a ‘reasonable belief’ that the agency has the type of information sought -- insure the production for inspection of all potentially relevant documents. The in camera review procedure and disclosure guidelines set forth in section 1045 guarantee, in turn, a balancing of the officer’s privacy interests against the defendant’s need for disclosure.” (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

Most of the progeny of *Pitchess*, like *Pitchess* itself, are cases where the relevant information pertains to complaints about, and investigations of, the officer separate from the incident for which the moving defendant is facing trial. This, however, is not a typical case. Here it is only because these statements were obtained as a result of the complaint filed by petitioners, and investigated by the department, that they would not have been produced, without the necessity of a motion, in the ordinary course of discovery as witness statements.

The trial court recognized the relevance and materiality of these witness statements initially, but reversed that appropriate finding. That later determination was not, however, founded on an analysis of whether the facts set forth in the motion were sufficient to demonstrate the legally required connection between the charged offenses and the information sought. Such an analysis is not only required by law, but also appears straightforward in the case of witness statements. Instead, the court relied on hypothetical concerns about situations that could arise in other cases, policy concerns that might be relevant to a legislative review of the statutory scheme, but are not within the discretion entrusted to the court. The critical protections embodied in the statutes and the

¹ Material information, as in *Brady*, includes information to impeach the officer’s credibility. (*People v. Husted* (1999) 74 Cal.App.4th 410, 417.)

Pitchess rules require the court to make a determination of relevance and materiality specific to the case before it. Using reasons unrelated to relevance and materiality to create an increased burden on discovery because of the manner in which the information was created is arbitrary and irrational; it is an abuse of discretion. As the record indicates that such reasons were the basis for the ruling under review, it must be reversed.²

The court stated: “Right. Precisely. I follow you. There is no dispute. We are on the same wavelength. But one of the issues is, Mr. Beck, is what would prevent then in every court in every case, in every case, because this case is not any special or more important or less important than any other case. All cases stand on their own facts and their own moving documents. [¶] But without a further showing, if I am to grant your request in this case and not reverse myself, what differentiates this case, and I don’t mean to talk about other cases, but every case, every case has the same request. Every case where there is a police officer involved with an individual subject to *Pitchess*. Not only are we going through the traditional *Pitchess* motion but then we would go through this process because there is nothing – there is nothing, absolutely nothing to differentiate this case from any other hundreds of thousands of cases in the State of California because every lawyer for the defense and the prosecution is always looking for that impeachment evidence, that information that is welcome in every case. [¶] [Presumably Mr. Beck]: And to answer the court’s inquiry, in that respect it is not different. What distinguishes it and what sets this case apart is because we now know that there was an administrative investigation into the incident that is being prosecuted and many, many of the cases, in fact in most of the cases in which a police officer alleges to be a victim of a crime by a defendant, there is no administrative investigation, there is no statement to seek, there is no motion to make as to that kind of evidence. [¶] The Court: Yeah. If that were to be

² “A motion for discovery of peace officer personnel records is ‘addressed solely to the sound discretion of the trial court.’” (*People v. Gill* (1997) 60 Cal.App.4th 743, 749.) ““A trial Court’s decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard.” (*People v. Mooc, supra*, 26 Cal.4th at p. 1228.)

the case, every person charged with a crime, all that he or she has to do to make it work is make that complaint irrespective of his well founded or his foundation factually and therefore every time a complaint is made there is a requirement that there is -- that an investigation has to be conducted so therefore the department cannot sit idle once a complaint is made, once a complaint is made. That triggers the mechanism and therefore it opens all the flood gates, correct?"

The trial court was silent on the relevance and materiality of the evidence. It made no finding that the complaint filed in this case was filed in bad faith, or for the purpose of creating a record that the defense could exploit at trial. And, because it refused to conduct the in camera review it initially ordered, the court did not determine if Lieutenant Bohlin's representation that he had taken witness statements was erroneous.

While it was not improper for the court below to take note of the concern expressed by real party that granting a motion in this case was outside the delicate balance created by the courts and the legislature in this arena, its resolution was not faithful to established law. The intention of the *Pitchess* mechanism is not to allow defendants unfettered access to police personnel files, nor should it be. But neither should the balance be struck in a manner that denies a defendant a fair trial by foreclosing discovery of critical evidence. Here, there is a complaint against by the arresting agency in the very incident on which the prosecution is based; the request for discovery must be analyzed in light of those facts. The fact that other defendants, in other cases, might potentially file a complaint in bad faith for the purpose of generating discoverable evidence does not deprive these respondents of their rights out of a hypothetical concern that this case will be the breach in the dam through which all future cases will pour. As already discussed, the analysis in each case must be made on the facts of that case and in light of the rights of the parties.

Real party argues that to maintain the public's confidence in its police force, a law enforcement agency must be able to promptly, thoroughly and fairly investigate allegations of officer misconduct. The argument relies on the assertion that if police departments are not entitled to maintain the integrity of statements obtained to determine

whether an officer's conduct comported with internal policies, there could be a chilling effect on carrying out such investigations to the detriment of the public and the departments. Moreover, they argue, if conducting an investigation promptly will be perceived as putting the department and the officer at a disadvantage in a criminal trial, agencies may be tempted to delay investigations or hold them in abeyance until the criminal prosecution is completed. Without minimizing that concern, to the extent it is appropriate for a court rather than the legislature, it must in any event, be weighed against the constitutional and statutory provisions that preserve the right of each defendant to information necessary to a fair trial in the pending case.³

On the record before the court in this case, there is no basis to presume that this complaint was filed for the purpose of generating discovery, nor is there a basis to presume that this agency did not, and will not in the future, conduct its investigations of such complaints in full compliance with the law. The constitutional and statutory mandates, ensuring the petitioners a fair trial, were improperly disregarded here. Petitioners have shown entitlement to discovery of the percipient witness statements.

³ Even in a civil case where the constitutional imperatives are lessened, parties cannot rely on a hypothetical parade of horrors, but must base their arguments on the facts of record. In *Haggerty v. Superior Court* (2004) 117 Cal.App.4th 1079, a jail inmate brought suit against a deputy sheriff, claiming the deputy violated his civil rights by using excessive force against him. The inmate filed a motion for discovery of documents contained in the deputy's personnel file, including the entire internal affairs investigation file of the incident between the deputy and the inmate. The department argued, as does real party here, that the disclosure would have a chilling effect on investigations of citizen complaints. The trial court refused to limit the discovery to names, addresses and telephone numbers of the witnesses identified in the internal affairs report, because the facts gleaned from the internal investigation were directly relevant to the matters at issue in the lawsuit. Finding the concerns expressed by the Department speculative, the Court noted that while the balancing process embodied in the *Pitchess* procedure permits the trial court to make a finding that the need for secrecy outweighs the need for disclosure, (*Haggerty, supra*, 117 Cal.App.4th at p. 1092), that need must be demonstrated. In *Haggerty* there was no finding made; here no evidence was presented to the trial court on which such a finding could have been made.

DISPOSITION

Petitioners' request for a writ of mandate is granted. The Appellate Division of the Superior Court is ordered to vacate its order of May 3, 2004, and to grant the petition. The stay imposed by this court on May 28, 2004, is lifted. Each side to bear its own costs on appeal.

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ZELON, J.

I concur:

JOHNSON, Acting P. J.

WOODS, J., Concurring and Dissenting:

I concur in the judgment reversing the trial court by granting the petition for writ of mandate, but dissent from the holding of the majority that “Petitioners have shown entitlement to discovery of the percipient witness statements.” I write separately to emphasize why I am of the opinion that the trial judge was properly and forthrightly concerned about the practical consequences of granting the defense motion for discovery in this instance. The motion was not an easy one for resolution by the trial judge nor an easy one for resolution by this court. The difficulty has its genesis in the fact that the case is hybrid in nature. Ordinarily one would expect the issue of discovery of police personnel records to surface in the context of defense efforts in a pending criminal case under what is commonly referred to as a *Pitchess* motion seeking discovery of third party statements inimical to the police officers in the current criminal action. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; codified in Evid. Code §§ 1040-1047.)

Alternatively, discovery of police officer files are typically sought in the context of a civil action against purportedly offending police officers where standard civil discovery devices are employed under the Code of Civil Procedure. This case falls somewhere in between as a result of the interim administrative complaint brought by the defendants against the police officers for their alleged misconduct. Upon the filing of a citizen’s complaint with the police department, the case metastasized into its hybrid posture taking on civil, administrative and criminal aspects, both real and potential. The case retained its criminal characteristic from the fact of the ongoing prosecution against the petitioners, potential criminal aspects against the officers if grounds for criminal charges against the individual officers developed during the investigation of the citizen’s complaint, potential criminal aspects against unknown officers and agents of the Hermosa Beach Police Department if charges of fraud asserted by the petitioners were extant in connection with

the amendment to the information to add criminal counts following the investigation of the officers, potential administrative law aspects against the officers if grounds for discipline were found at the conclusion of the investigation of the citizen's complaint against the officers and potential civil aspects against the officers, department and the city for alleged officer misconduct.

In the midst of this metastasis, the trial judge was prudent in being alarmed, but committed error in failing to embark on the procedures required by *Pitchess*. I take issue with the majority, however, in holding that the trial judge had grounds for ruling that the initial step of a finding of good cause had been reached and the petitioners were entitled to discovery of the verbatim statements. Prior to an actual in camera examination of the records the trial judge should have initially taken evidence and made a finding pertaining to the motive of petitioners in seeking disclosure of the verbatim statements, i.e., was it out of a desire and demonstrated good faith need¹ for the statements in defense of the criminal charges against petitioners or was the motive altruistically centered on the desire of the petitioners to maintain a proper functioning police department or was the motive self-centered in which petitioners were merely desirous of getting the jump on civil discovery for an anticipated future civil action against the police officers, the department and the City of Hermosa Beach.

Should the trial judge find that the initial hurdle of good cause has been cleared by petitioners, the in camera examination should be well tailored in my opinion to prevent disclosure of any personal conclusions made after the taking of the officer statements. Additionally, the trial court should perform what it was reluctant to do in this instance, namely, make a finding on the content of each verbatim officer statement to assay any impeachment value for cross-examination in the statements. This is an onerous task, but

¹ The good faith showing of need by petitioners must be considered in light of what petitioners already possessed, i.e., videotape of the incident, successful results in a prior *Pitchess* motion thus acquiring any third party statements of complaints about previous officer misconduct, and voluntary discovery revelations by the district attorney's office of all exculpatory evidence under *Brady v. Maryland, supra*, 373 U.S. 83.

one which must be undertaken if the initial good faith motive is established by petitioners.

I concur in the judgment except as above indicated.

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WOODS, J.